

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES E. BORGMEYER**

Claimant

VS.

**MSS TRANSPORT, INC.**

Respondent

AND

**AMERICAN INTERSTATE INS. CO.**

Insurance Carrier

Docket No. 1,040,300

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the January 27, 2010, preliminary hearing Order entered by Special Administrative Law Judge C. Stanley Nelson. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Terry J. Torline, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Special Administrative Law Judge (SALJ) found there was insufficient evidence to justify a change in physician to treat claimant's left lower extremity. The SALJ further found that claimant's notice of intent letter dated November 12, 2009, lacked the specificity required in K.S.A. 44-534a(a)(1) in regard to claimant's request for temporary total disability compensation. Finally, the SALJ held that he had no jurisdiction to enter any order as a result of the December 11, 2009, preliminary hearing because claimant failed to comply with K.S.A. 44-534a(a)(1) by not filing an Application for Preliminary Hearing accompanied by claimant's notice of intent and certification that the notice of intent letter was served on respondent's attorney and the request for a benefit change was either denied or not answered within seven days after service.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 11, 2009, Preliminary Hearing and the exhibits; the transcript of the May 22, 2009, Preliminary Hearing and the exhibits; and the transcript of the December 19, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

### ISSUES

Claimant contends that his November 12, 2009, notice of intent letter set out a specific statement of the benefit change being sought regarding temporary total disability compensation and, therefore, the SALJ had jurisdiction to decide that issue. Claimant argues that the SALJ's strict construction of K.S.A. 44-534a(a)(1) is beyond the impartiality recognized in the Workers Compensation Act because the respondent is not prevented from raising defenses and arguing many different compensability issues at a preliminary hearing without giving claimant any advance notice of respondent's intent to do so. Further, claimant argues that K.S.A. 44-534a(a)(1) does not describe the nature of the specificity claimant has to include in his letter of intent. Claimant also asserts that respondent was not denied due process by having the issue of temporary total disability compensation included in the preliminary hearing held December 11, 2009. Last, claimant contends he provided the appropriate certification of denial of said benefits requested in the notice of intent letter in the Applications for Preliminary Hearings he filed on September 16, 2009, and October 7, 2009. Claimant asks that the Board remand the case to the ALJ with the direction that claimant's notices of intent carry the requisite specificity called for in K.S.A. 44-534a(a)(1).

Respondent argues that claimant failed to properly specify temporary total disability compensation as a benefit being requested in the November 12, 2009, notice of intent letter as required in K.S.A. 44-534a(a)(1). Further, respondent contends that claimant failed to follow statutory procedures to vest jurisdiction on the SALJ by failing to file an Application for Preliminary Hearing accompanied by claimant's notice of intent letter and certification that the notice of intent was properly served. Respondent argues that the certifications claimant filed on September 15, 2009, and October 7, 2009, were filed before November 12, 2009; therefore, they do not certify that the November 12, 2009, notice of intent letter was properly served or was denied or went unanswered.

The issues for the Board's review are:

(1) Did the SALJ lack jurisdiction over claimant's request for benefits in the preliminary hearing held December 11, 2009, because claimant did not file an Application for Preliminary Hearing with the required attachments per K.S.A. 44-534a(a)(1)?

(2) If the SALJ did have jurisdiction, did claimant's November 12, 2009, notice of intent letter set out with proper specificity that temporary total disability compensation was being requested as a benefit change?

(3) Did claimant's Applications for Preliminary Hearings filed September 16, 2009, and October 7, 2009, give the SALJ jurisdiction over the issue of temporary total disability benefits?

FINDINGS OF FACT

Claimant sent respondent a notice of intent letter dated November 12, 2009, which requested a benefit change, *i.e.*, “[a]uthorization for additional treatment and change of treating physician to claimant’s left lower extremity.”<sup>1</sup> Under that request, claimant’s attorney added boilerplate language stating:

Other possible issues include:

1. Temporary total disability for days, weeks not paid, if applicable;
2. Temporary partial disability for days, weeks not paid, if applicable;
3. Payment for all outstanding medical bills, if any;
4. Appropriate medical treatment;
5. Change of claimant’s treating physician, when appropriate;
6. Reimbursement to claimant for medical mileage not previously reimbursed;
7. Reimbursement of unauthorized medical not previously reimbursed, if any;
8. Reimbursement to claimant for prescription costs not previously reimbursed.<sup>2</sup>

Claimant did not file an Application for Preliminary Hearing after the November 12, 2009, notice of intent letter was served on respondent’s attorney. Nor was any certification filed indicating that the November 12, 2009, notice of intent letter was properly served on respondent’s attorney, and there has been no certification that respondent or its attorney denied claimant’s request for change of benefit or that the request for change of benefit went unanswered.

At the December 11, 2009, preliminary hearing, the SALJ asked claimant’s attorney what the claimant was requesting in connection with the preliminary hearing, and claimant’s attorney answered: “Change of authorized treating physician away from Dr. Daily, and temporary total disability benefits beginning the date claimant was laid off . . . .”<sup>3</sup> In response, respondent’s attorney stated:

The respondent’s position with request to the request for TTD is that this Court lacks jurisdiction, primarily because the claimant failed to follow the necessary steps, specifically as far as identifying TTD as an issue for this hearing. . . .<sup>4</sup>

---

<sup>1</sup> P.H. Trans. (Dec. 11, 2009), Cl. Ex. 10 at 1.

<sup>2</sup> P.H. Trans. (Dec. 11, 2009), Cl. Ex. 10 at 1-2.

<sup>3</sup> P.H. Trans. (Dec. 11, 2009) at 4.

<sup>4</sup> *Id.* at 6.

Testimony was taken from claimant, and the SALJ found insufficient evidence to justify a change in treating physician. He further found that the boilerplate language in claimant's notice of intent letter setting out "[t]emporary total disability for days, weeks not paid, if applicable"<sup>5</sup> as a possible issue did not qualify as a specific statement of the benefit change being sought because respondent would not be able to determine what temporary total disability benefits claimant was requesting.

After making those findings, however, the SALJ held:

Further, there is no evidence before the Court that, after faxing Claimant's Exhibit 10 (Claimant's Notice of Intent letter) to Respondent's attorney, Claimant complied with K.S.A. [44-534a(a)(1)] by filing an Application for Preliminary Hearing, accompanied by Claimant's Exhibit 10, and Claimant's certification that the notice of intent letter was served on the adverse party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Therefore, the Court has no jurisdiction to enter any order as [a] result of this preliminary hearing.<sup>6</sup>

Claimant's attorney, in his brief to the Board, contends that two such certifications for denial were filed before the preliminary hearing held December 11, 2007, one that was attached to claimant's Application for Preliminary Hearing filed with the Division on September 16, 2009, and one that was attached to claimant's Application for Preliminary Hearing filed with the Division on October 7, 2009. A September 8, 2009, notice of intent letter set out the specific benefit requested as "[a]uthorization for evaluation and treatment to right lower extremity" and a August 31, 2009, notice of intent letter set out the specific benefit requested as "[a]uthorization for evaluation and treatment to claimant's back."<sup>7</sup> Both letters added the boilerplate language as set out above. A September 29, 2009, notice of intent letter set out the specific benefit requested as "[t]emporary total disability benefits beginning 9-29-09 until claimant is released to substantial and gainful employment as claimant's employer is unable to accommodate his restrictions,"<sup>8</sup> along with the boilerplate language set out above.

---

<sup>5</sup> *Id.*

<sup>6</sup> ALJ Order (Jan. 27, 2010) at 7-8.

<sup>7</sup> Attachments to Application for Preliminary Hearing filed by claimant Sept. 16, 2009.

<sup>8</sup> Attachment to Application for Preliminary Hearing filed Oct. 7, 2009.

**PRINCIPLES OF LAW**

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be.<sup>9</sup>

K.S.A. 44-534a(a)(1) states:

After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>11</sup>

---

<sup>9</sup> *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

<sup>10</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. \_\_\_, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>11</sup> K.S.A. 2009 Supp. 44-555c(k).

### ANALYSIS

K.S.A. 44-534a(a)(1) requires that at least seven days before filing an application for a preliminary hearing, claimant must give respondent "a specific statement of the benefit change being sought." In this case, claimant's November 12, 2009, letter to respondent's counsel stated that "the specific worker's compensation benefits requested are: 1. Authorization for additional treatment and change of treating physician to claimant's left lower extremity."<sup>12</sup> A laundry list of possibilities does not satisfy the requirement for a specific statement. Claimant's letter, by its own terms, states that the only "specific" requested benefit being sought is additional treatment. Furthermore, despite the statement in claimant's letter that the change of treating physician being requested was for "claimant's left lower extremity," at the preliminary hearing claimant also requested authorized treatment for his right lower extremity and back.

In addition, claimant failed to file an application for hearing after his November 12, 2009, letter and failed to file a certification that the benefits requested in the November 12, 2009, notice of intent letter were denied or not answered.

For these reasons, the SALJ was correct in concluding that he lacked jurisdiction to proceed on claimant's request for preliminary hearing benefits.

### CONCLUSION

The SALJ did not have jurisdiction over the claimant's request for benefits at the December 11, 2009, preliminary hearing.

### ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson dated January 27, 2010, is affirmed.

**IT IS SO ORDERED.**

---

<sup>12</sup> P.H. Trans., Cl. Ex. 10 at 1.

Dated this \_\_\_\_\_ day of April, 2010.

\_\_\_\_\_  
HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c:     Roger A. Riedmiller, Attorney for Claimant  
       Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
       C. Stanley Nelson, Special Administrative Law Judge  
       Bruce E. Miller, Administrative Law Judge